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No. 96-583

*In the Supreme Court of the United States*

OCTOBER TERM, 1996

**ROSLYN UNION FREE SCHOOL DISTRICT NO. 3 et al.,**

***Petitioners,***

**-against-**

**EMILY HSU, by and through her next friend, DR. CHIN-CHING HSU, et al.,**

***Respondents.***

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

# PETITIONERS' REPLY BRIEF

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14 pp

## TABLE OF CONTENTS

*Page(s)*

TABLE OF AUTHORITIES ..... ii

REASONS FOR GRANTING THE WRIT ..... 1

A. The Court of Appeals did Not Treat the Appeal as a Review of an Interlocutory Order and, In Light of the Issues of National Importance Presented, There Are Compelling Reasons for Granting the Writ ..... 1

B. Respondents' Right of Association Is Not Abridged by the District's Nondiscrimination Policies ..... 4

C. The District's Policies Do Not Require the Club to Express a Message With Which It Does Not Agree or Limit the Club's Access To School Facilities Based Upon the Viewpoint of its Speech ..... 6

D. Requiring the School District to Exempt a Religion Club from its Nondiscrimination Policies Creates a Symbolic Union Between Church and State ..... 8

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

*Page(s)*

*Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) ..... 8

*Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) ..... 3

*Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981) ..... 4

*Gomillion v. Lightfoot*, 364 U.S. 339 (1960) ..... 4

*Griffin v. County School Board of Prince Edward County*, 375 U.S. 400 (1964) ..... 4

*Healy v. James*, 408 U.S. 169 (1972) ..... 5,6

*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct.2338 (1995) .... 7

*Lee v. Weisman, 505 U.S. 577 (1992)* ..... *10*

*Lloyd v. Grella, 83 N.Y.2d 537 (1994)* ..... *9*

*New York State Club Assoc. v. New York, 69 N.Y. 2d 211 (1987) aff'd 487 U.S. 1 (1988)* ..... *3,5*

*Rosenberger v. Rector and Visitors of the University of Virginia,____U.S.___, 115 S. Ct. 2510 (1995)* ..... *7,8*

*Tinker v. Des Moines Indep. Community School District, 393 U.S. 503 (1969)* . . . . . 5

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

# PETITIONERS' REPLY BRIEF

Petitioners submit this brief in reply to respondents' opposition to the petition for writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### A. The Court of Appeals did Not Treat the Appeal as a Review of an Interlocutory Order and, In Light of the Issues of National Importance Presented, There Are Compelling Reasons for Granting the Writ

Respondents assert that this Court should not grant the writ because petitioners are seeking review of a nonfinal order.

(Resp. Brief, 8) Although the appeal to the court of appeals was from the denial of a preliminary injunction, the Second Circuit treated the case as a review of a final judgment. The court of appeals found that "there is no sign that the factual record needs development or that factual disputes need resolution before the merits of the plaintiffs' claims can be finally decided." It noted that "there is no indication that the district court's consideration of this case was abbreviated . . ." and that the purpose of the preliminary injunction motion was to alter, not preserve, the relative positions of the parties. (A 17-18)[1] The Court continued,

> In these ways, the district court's decision, explained by a decisive and categorical opinion, resembled a definitive ruling on the merits of the plaintiffs' claim. As in *Romer* [v. *Green Point Savings Bank*], the district court's decision "effectively award[ed] victory in the litigation" . . . [T]he district court's resolution of the case hinged not on what the facts were - - since the material ones are undisputed - - but on how the law should be applied. As a result, our review of the district court's denial of a preliminary injunction is plenary. (A 18-19).

As a result, the court concluded that a future summary motion would be a little more than a formality. (A 18-19). In light of the decision, it is disingenuous for respondents to argue that the petition seeks review of a nonfinal order. Although the court

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[1] Number references refer to pages in the Appendix.

remanded the matter to the district court for additional proceedings "if necessary," it is clear that the court viewed its decision as final and determinative.

In addition, respondents' assertion that petitioners have not offered compelling reasons for granting the writ can only be explained by their refusal to recognize the obvious and understand the impact that the decision has on the ability of schools to carry out their educational missions and to protect the rights of all students. The District's nondiscrimination policies are designed to prevent invidious discrimination. As the district court correctly recognized, "the school district's interest, . . . in eliminating and preventing religious discrimination in school certainly may be characterized as 'compelling.'" (A 112) *See also New York State Club Assoc. v. New York*, 69 N.Y. 2d 211, 223 (1987) *aff'd* 487 U.S. 1 (1988) (government has a compelling interest to eliminate discrimination); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (state has a compelling interest in eliminating discrimination).

This is a case of first impression which has broad implications for our nation's public schools and their ability to fight unlawful discrimination on their campuses. It presents a direct clash between the rights of students to practice their religion at school, the rights of students to attend public schools free of religious discrimination, and the right of school districts to establish reasonable rules of conduct to accomplish their educational goals. In light of the significant constitutional issues raised and the national importance of the questions presented, it is appropriate for this Court to grant the writ

regardless of whether the court of appeals' decision is deemed final. *E.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Griffin v. County School Board of Prince Edward County*, 375 U.S. 400 (1964) (granting review of interlocutory order where important issues of national importance presented).

**B. Respondents' Right of Association Is Not Abridged by the District's Nondiscrimination Policies**

Respondents assert that the court of appeals' decision is justified by their right of free association which entitles them, when the purpose of the group is expressive, to identify the people who constitute the association and limit the association only to those people. (Resp. Brief, 15). Relying principally on *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981), they argue by analogy that their right of association is infringed by the District's policies because the inclusion in their group of persons who do not share their group's beliefs, may distort and impair the group's "essential functions." (Resp. Brief, 14). Respondents' position is based upon the faulty assumption that the student religion club is a "private group" free to establish any eligibility criteria it deems appropriate for its "expressive" purposes and totally ignores the fact that this group exists only in the context of a public school setting.

The student Christian religion club is not a distinctly private group and plaintiffs have offered no authority in support of their proposition that a *school club* is a private association. A school club bears not only a close connection with a public school, but an exclusive relationship. It has no existence apart from the school. The club's close connection with the public

school, the requirement of Board authorization, the club's use of school facilities, and its access to the student body, clearly distinguishes it from a private group. The district court correctly recognized that "by characterizing their club as a 'private group' free to discriminate on any basis it chooses, plaintiffs ignore the obvious - - the bible club is a 'student club'". (A 114) Private clubs which are not distinctly private can be required to abide by nondiscrimination laws since such laws further a compelling government interest. *New York State Club Assoc. v. City of New York*, 69 N.Y.2d 211 *aff'd* 487 U.S. 1 (1988). Moreover, since the club is part of the school community, the District is entitled to subject it to reasonable regulations aimed at preventing interference with the opportunity and rights of other students. *Cf. Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

Respondents also fail to recognize what this Court has repeatedly recognized - - that there is a distinction between advocacy and action. In *Healy v. James*, 408 U.S. 169 (1972) this Court held that "[t]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. *Id.* at 191-192 This Court concluded that "the benefits of participation in the internal life of the college community may be denied to *any* group that reserves the right to violate any valid campus rules with which it disagrees." *Id.* at 193-194. (emphasis added) Here, the club wants to engage in activity which is more appropriately characterized as conduct rather than advocacy and which violates important campus rules.

The record lacks any evidence that the District's nondiscrimination policies force the club to abandon or alter its religious activities. The club members may meet and pray together. They may speak out, assemble and even petition for changes in the school rules with which they disagree. The members may elect their leaders and assign spiritual duties to those students they feel most qualified to perform them. They may *express* their views regarding the type of person who should hold office and the qualities and qualifications he or she should possess. Thus, the District's policies do not in any meaningful way limit respondents' ability and opportunity to combine with others to advance their views. The policies restrict the club from engaging in *conduct* which infringes upon the rights of other students and which substantially impairs the District's ability to perform its function. As a result, consistent with *Healy*, the District may require that respondents abide by its reasonable campus law as a condition of official recognition, without violating their rights of association.

### C. The District's Policies Do Not Require the Club to Express a Message With Which It Does Not Agree or Limit the Club's Access To School Facilities Based Upon the Viewpoint of its Speech

Respondents argue that the message they wish to convey is that only those students with a public commitment of faith in Jesus Christ have the necessary qualifications to be the spiritual leaders of the club and that this directly conflicts with the message the District wants the club to transmit - - that any student, regardless of their faith or commitment is equally qualified to serve as an officer. (Resp. Brief, 12) The Board's

nondiscrimination policies convey no such message, nor do they limit respondents *expression* of their religious beliefs. The District's policies make no statement as to a student's qualifications to serve as an officer and certainly do not force the club to accept as its leader a student whose beliefs are inconsistent with those of its members or who is not committed to the objectives of the club. The policies simply make all students equally eligible for consideration by the membership without undergoing a religious litmus test. Like every other student club, the club members, as a whole, without District interference, will decide which student is the most qualified to lead the club by electing that student to office. Nothing in the District's policies prohibits any club member from speaking out or expressing his or her views regarding what qualities a candidate for office should possess and nothing in the policies prohibits a candidate for office from expressing his or her religious beliefs as part of an election campaign. For this reason, among others (see Petition p. 17-18) respondents' reliance on this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ *U.S.* ___, *115 S.Ct. 2338 (1995)* is misplaced. The policies do not force the club to incorporate in its message one with which it does not agree. The members are free to express their views and through the election process elect the most qualified candidate to lead them.

Similarly, respondents' reliance on *Rosenberger v. Rector and Visitors of the University of Virginia*, ___ U.S.___, 1155 Ct. 2510 (1995) is misplaced since the District, by requiring the club to abide by its neutral nondiscrimination policies is not engaging in viewpoint discrimination. The

District is not attempting to regulate respondents' *speech* based on the substantive content or the message they wish to convey. The opinions and perspective of the "speaker" are not the rationale for the restriction. The club was allowed to organize and meet. No restrictions were placed on club members from expressing their views on *any* topic from *any* viewpoint. The District's policies do not restrict speech, only conduct which is violative of the rights of other students and disruptive of the District's educational mission. Neither *Rosenberger* nor *Board of Education of the Westside Community Schools v. Mergens,* 496 U.S. 226 (1990) suggest that the District is required to tolerate such conduct either under the Free Speech Clause or the Equal Access Act.[2]

### D. Requiring the School District to Exempt a Religion Club from its Nondiscrimination Policies Creates a Symbolic Union Between Church and State

An important concern of the *Lemon* effects test is whether the government action creates a symbolic union between church and state which is likely to be perceived by adherents as an endorsement and by nonadherents as a disapproval of their religious choices.[3] Requiring a school

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[2] It is significant that the groups in both *Rosenberger* and *Mergens* did not discriminate in their membership *See Rosenberger*, ___ U.S. ___ 115 S. Ct. at 2514; *Mergens*, 496 U.S. at 232.

[3] Petitioners' position regarding the correct application of the *Lemon* test is set forth in the Petition (Pet. 24-28). Petitioners have not abandoned their position with respect to the first prong of the *Lemon* test. (*See*, Petition, 26)

district to exempt a religion club from its nondiscrimination policies does just that.[4]

The Equal Access Act does not distinguish between mainstream religions and minority ones. It is entirely possible that in some communities the entire student body, except for a handful of students, would be members of a religion club. A school approved exemption from an established nondiscrimination policy which effectively authorizes the club to discriminate against these students, excluding them from participation in the club with the District's blessing, is a clear

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[4] Respondents assert that no symbolic union could possibly be perceived between the District and the club because of the "evident hostility" of the District to the club (Resp. Brief, 26) Respondents repeatedly misrepresent the District's actions in an obvious attempt to portray the District as hostile to their religion, and thus, unworthy of this Court's consideration of this case. The record, however, demonstrates that Emily Hsu's request for a new club was presented to the school board as required for all new student clubs and that by January, 1994 the Board was prepared to grant the request. (A 140) Additional delay was occasioned by Emily submitting a proposed club constitution which clearly violated the District's policies, appeared to violate both federal and state law, and which required the Board not only to approve the club but, to authorize an exemption from its nondiscrimination policies which had never been done before. A New York school district may close its facilities to groups that discriminate. *Lloyd v. Grella,* 83 N.Y. 2d 537 (1994) (allowing school district to exclude groups which discriminate even though statute otherwise grants equal access). In an effort to resolve the dispute and avoid litigation, the Board offered to meet with respondents' counsel. Respondents rejected the offer and commenced suit the next day. (A 147) Nevertheless, at its next meeting, the Board adopted the resolution authorizing the club. (A 147). As this Court properly recognized a school district may avoid its obligations under the Equal Access Act by forgoing federal financial assistance. *Mergens* 496 U.S. at 240. The District did not do so, but instead allowed the club to organize. Although allowed to meet, respondents chose not to do so. The choice not to meet was their own.

example of a symbolic union. While the student population at Roslyn may be more diverse, a Board "stamp of approval" of an exemption for this religion club from its generally applicable nondiscrimination policies is no less offensive to the Establishment Clause. This action is occurring in the context of a school setting, a fact almost ignored by respondents. Justice Kennedy's observation in *Lee v. Weisman*, warrants repeating: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machines of the State to enforce a religious orthodoxy. 505 U.S. 577, 592 (1992).

## CONCLUSION

The Petition Should Be Granted.

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Respectfully submitted

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